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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

ARNOLD NAMBROW AND LILLIE NAMBROW, husband and wife, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

JAY C. MAXWELL AND DOROTHY N. MAXWELL, husband and wife, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Certiorari is respectfully sought, to review the judgment of the Court of Appeals.

OPINIONS BELOW

The Tax Court's opinion is reported at 33 T.C. 419, and, together with the Tax Court's formal decisions in these two dockets, is printed at R. 159-190.[1] The

[1] "R" refers to the Appendix Record printed for the use of the Court of Appeals; besides the certified copy, petitioners have filed nine additional copies thereof with the Clerk of this Court. "Tr" refers to Volume II of the Transcript of Record as certified by the Clerk of the Court of Appeals.

Court of Appeals opinion is reported at 288 F.2d 648, and, together with the Court of Appeals judgment and the order denying rehearing, is printed in the Appendix to this Petition for Certiorari.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and § 2101(*e*) and under 26 U.S.C. § 7482(a).

The Court of Appeals rendered its opinion (Tr. 9-20) and its judgment (Tr. 21) on March 27, 1961. Petitioners' time for filing a petition for rehearing was extended to May 10, 1961 (Tr. 21-22). On May 10, 1961 petitioners filed a motion for rehearing. On May 31, 1961 the Court of Appeals denied rehearing, stating in its order: "The motion for rehearing in this case has been read and considered, and the Court being of the opinion that it is without merit it is hereby denied" (Tr. 36). This Petition for Certiorari is filed within ninety days thereafter.

QUESTIONS PRESENTED

1. Whether a doctor of medicine who is already a qualified practicing psychiatrist and enrolls in a psychoanalytic institute—whereby he obtains further training and experience in psychoanalysis and also receives cases by referrals—may deduct as business expenses:

(a) fees the psychiatrist pays to a senior doctor for a psychoanalysis, which the psychiatrist himself undergoes in accordance with the institute's program;

(b) fees the psychiatrist pays to senior doctors for supervising a certain number of the psychia-

trist's cases, such supervision likewise being in accordance with the institute's program;

(c) sums paid for attending the institute's seminars, etc.

2. Whether, in the alternative, the fees the psychiatrist pays for his own psychoanalysis are allowable medical expense deductions.

3. Whether the Court of Appeals attributed undue finality, or gave undue deference, to the Tax Court's findings and determinations in this case.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix to this Petition (beginning at page 12a, infra).

STATEMENT

This is a federal income tax case arising out of the 1954 joint return filed by petitioners Dr. Arnold Namrow and his wife, and out of the 1954 and 1955 joint returns filed by petitioners Dr. Jay C. Maxwell and his wife.

During the tax years in question Drs. Namrow and Maxwell were doctors of medicine and qualified practicing psychiatrists. The tax issues relate to the deductibility of certain expenses paid out by them directly in connection with their practice of their profession. The two tax cases, having been consolidated for trial before Judge Black in the Tax Court (R. 1-2), were treated and disposed of together in the Tax Court and also (Tr. 4-5) in the Court of Appeals.

At the trial, testimony was given not only by petitioners, Drs. Namrow and Maxwell, but also by Dr. Bullard (Medical Director of Chestnut Lodge Sanitarium), Dr. Overholser (Superintendent of St. Elizabeth's Hospital and past President of the American Psychiatric Association), Dr. McLaughlin (Director of the Baltimore Psychoanalytic Institute) and by one other expert witness. Many of the principal facts are summarized in the Court of Appeals opinion (pages 1a-10a, infra).

Psychiatry is a medical specialty, recognized as such by the American Medical Association, the American Psychiatric Association and the American Neurological Association. The minimum qualification required for a psychiatrist consists of an M.D. degree from a recognized medical school, one year of general internship and one year of specialized residency in an approved institution for treatment of mental disorders. Prior to the tax years in question, Drs. Namrow and Maxwell had qualified as psychiatrists and were actively engaged in practicing psychiatry (R. 161).

Psychoanalysis is a technique of psychotherapy which is used by many psychiatrists. Psychoanalysis is not a specialty recognized as such by the American Medical Association (R. 21, 51), and there is not any American Board of Psychoanalysis (comparable to the American Board of Psychiatry and Neurology) which passes on the qualifications or competency of doctors to use psychoanalytic methods in their practice (R. 18).

Psychiatrists who have never been affiliated with any psychoanalytic institute frequently use psychoanalytic methods in their practice of psychiatry; and the record shows that both Dr. Namrow and Dr. Maxwell did so in their practice prior to their connection with the Washington Psychoanalytic Institute (R. 81-

82, 111-112), as well as during the tax years here in issue. As Dr. Overholser testified, "the basic principle of psychoanalysis has permeated the whole of psychiatry" and "any psychiatrist to my mind is utilizing to some extent, certainly, psychoanalytic principles, methods and techniques" (R. 54).

The American Psychoanalytic Association and its constituent local societies have devoted considerable effort to bringing about improvements in the knowledge and use of psychoanalytic methods. In this connection, psychoanalytic programs are carried on at various psychoanalytic institutes which meet the standards of the American Psychoanalytic Association (R. 161-162).

One such institute is the Washington Psychoanalytic Institute. Its program consists of three divisions (R. 162-166). One is that the psychiatrist himself undergoes psychoanalysis, paying regular fees therefor to the doctor who acts as the analyst. This psychoanalysis is intended to free the psychiatrist from his own personality factors which might interfere with his ability to treat his patients objectively, and for that reason is undertaken not only by psychiatrists, whether or not they are affiliated with an institute, but also (*John S. Watson*, 31 T.C. 1014) by other medical specialists as well. The record shows that this psychoanalysis is also considered to be of help in withstanding the special strains which a psychiatrist encounters in the practice of his profession (R. 65-66). A second division consists of treating a minimum of four of his cases under supervision from a senior doctor, whom the supervised psychiatrist pays for services rendered in connection with each supervised case. A third division is attendance and participation at

lectures and seminars, for which fees are paid to the institute. Expenses incurred by Drs. Namrow and Maxwell in each of these three categories are involved in this case (R. 166-167).[2]

Toward the end of the program, the psychiatrist prepares a clinical paper for submission to a panel at the institute. The entire program usually requires five years or more, for those who actually complete it (R. 166); at completion the psychiatrist is entitled to membership in the Washington Psychoanalytic Society and the American Psychoanalytic Association (R. 163, 167, 168). While participating in this program, the psychiatrist continues in his active practice of psychiatry; and he finds a considerable referral practice is generated through patients being referred to him by other psychiatrists affiliated with the institute (R. 83-84, 96, 113, 133, 177).

The Commissioner disallowed the claimed deductions and the cases were taken to the Tax Court (R. 159-160). A Tax Court majority held the disallowances proper. The Tax Court majority concluded that in attending the institute Drs. Namrow and Maxwell "were acquiring a new skill, not improving or sharpening up one they already possessed" (R. 176); and that under the new § 1.162-5 of the regulations, relating to expenses for education (see pages 13a-14a, infra), this constituted a bar to obtaining business expense deductions under Section 162(a) of the Internal Revenue Code. The Tax Court majority also concluded, with respect to the fees paid for supervision of specific

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[2] Dr. Maxwell's expenses include a payment he made in 1954 for being previously psychoanalyzed in Chicago, prior to moving to Washington and in connection with the program of the Chicago Institute.

cases, that any benefit to the patient would be "incidental"; that it was the supervised psychiatrist who "was to receive benefit"; and that this made the tax consequences entirely different from "the usual fee paid by a doctor for consultation with an expert with respect to a patient's treatment and care" (R. 179).

Judge Black (who had tried the case and heard the evidence), joined by Judges Harron, Tietjens, Withey and Forrester, dissented (R. 181-189). Their view was that Drs. Namrow and Maxwell had incurred these expenses to maintain and improve their skills in their profession, not for the purpose of engaging in a new specialty, and that psychoanalysis is nowhere recognized as a "specialty" within the meaning of § 1.162-5 of the regulations. They also were of the view that the payment of fees for supervision of specific cases was in any event deductible, since the supervisory doctor was being paid for help in treatment of patients of the supervised psychiatrist. In addition, the Tax Court unanimously concluded that the psychiatrist's expenses for being psychoanalyzed could not, in the alternative, be allowed as medical expense deductions under Section 213 of the Internal Revenue Code.

The Court of Appeals for the Fourth Circuit affirmed. It held the Tax Court's determination was not so clearly untenable and erroneous as to require that under the rule of *Commissioner* v. *Duberstein*, 363 U.S. 278, 290-291, and related cases, the judgment be reversed (page 9a, infra). Rehearing was denied May 31, 1961 (page 11a, infra).

REASONS FOR GRANTING CERTIORARI

I

This case involves novel questions which have not been, but ought to be, passed upon and settled by this Court. They are questions on which a definitive determination by this Court is important to the fair and uniform interpretation and administration of the federal tax laws.

The questions presented affect not merely these particular petitioners, Drs. Namrow and Maxwell, and not merely the numerous other comparably situated psychiatrists who practice in the Metropolitan Washington area or elsewhere within the jurisdiction of the Fourth Circuit. In addition these questions affect, directly and substantially, very sizeable groups of psychiatrists actively practicing their profession throughout the nation. Many tax returns for past, present, and indeed future years are affected. Moreover, the amount of taxes involved is considerable—particularly from the standpoint of younger doctors practicing psychiatry upon whom will fall most of the burden of this harsh, short-sighted and clearly erroneous decision.

As the findings show (R. 161-162, 167-168), the Washington Psychoanalytic Institute is one of some fourteen similar institutes, which meet the standards of the American Psychoanalytic Association and are located in principal cities of the United States. These various institutes are well distributed geographically[3]—a circumstance almost certain to result in

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[3] The fourteen are Baltimore; Boston; Chicago; Columbia University; Institute of the Philadelphia Association; Southern California; Los Angeles; New York; Philadelphia (Society) Institute; San Francisco; State of New York; Topeka; Washington; Western New England. See Lewin and Ross, Psychoanalytic Education in the United States (1960), p. 10. In addition, there are approved Training Centers in Cleveland, New Orleans and Seattle, and one has recently been established in Detroit. Ibid., pp. 11, 17-18, 54.

widespread and multiple litigation within the different federal circuits if the questions here at issue cannot be resolved definitively in this case by a decision on the merits from this Court.

Since 1954 the total number of psychiatrists enrolled during each year at these approved institutes has been about 900;[4] and it is understood that the figure has now risen to about 1,000. In addition, there are certain other psychiatrists' organizations (not affiliated with the American Psychoanalytic Association and its constituent organizations) which likewise have psychoanalytic training programs (R. 152-154), to some degree giving rise to comparable tax questions for their participating psychiatrists. This is apart from individual psychiatrists who, though not affiliated with any approved institute or other comparable organization, decide to undergo (and to pay for) psychoanalysis in order to improve their abilities and skill in practicing their profession (R. 31, 60, 149-152). Accordingly, it would be conservative to estimate that, on a national basis, there are by now upwards of 1,000 psychiatrists per year whose tax returns involve problems identical with, or very closely related to, the questions presented by this case.

The total amount of tax involved is plainly substantial. A psychiatrist affiliating with an approved institute, such as the Washington Psychoanalytic Institute, must assume it will take a minimum of five years for his work program there to be entirely completed (R. 166). The psychoanalysis which the psychiatrist undergoes in this connection is itself likely to extend over three or four years of this period (R. 63;

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[4] See Lewin and Ross, Psychoanalytic Education in the United States (1960), pp. 54-55.

see also Lewin and Ross, Psychoanalytic Education in the United States (1960), chapter X). While the total expenses incurred by the individual psychiatrist may vary—depending somewhat upon his particular situation and the region in which he is carrying on his work—available information shows that an average figure for the individual psychiatrist's total expenses in connection with meeting all the institute's requirements will come to about $20,000 ($15,000 for being psychoanalyzed;[5] $4,000 for payments made to senior doctors for supervision of specific cases; and $1,000 for courses, seminars, etc.), with the figure running considerably higher in some instances. See Lewin and Ross, Psychoanalytic Education in the United States (1960), pp. 92-93.

The present litigation was conducted as a test case, with general recognition of the fact that many similarly situated psychiatrists throughout the country might be directly affected by its outcome. Internal Revenue Service issued in 1957—and has continued in effect pending this case's final adjudication—a field memorandum directing revenue agents to hold in suspense all cases involving comparable expenditures by psychiatrists.[6] The result has been to accumulate a considerable backlog of cases for past years, in addition to those currently arising. Accordingly, unless a decision on the merits can be had from this Court in this case, it is to be expected that the lower federal courts throughout the country will become the arena for a

[5] The July 1961 issue of The Atlantic contains a Special Supplement on Psychiatry in American Life, in which (p. 62) the cost of the psychiatrist's psychoanalysis alone is given as "around $20,000".

[6] I.R. Mim. 57-93, Manual Supplement 45-G-30.

large volume of litigation, involving the very questions presented here. This arduous process of multiple adjudication would be time-consuming and docket-clogging for the courts, expensive and wasteful for both the Government and the taxpayers, and needlessly harassing for all concerned.

Such undesirable consequences can easily be avoided. In the interests of sound, efficient and economical administration of justice, and in the interests of uniformity of result for all of many similarly situated taxpayers, the questions here presented should be adjudicated definitively by this Court in this case. The policy considerations which bear upon this Court's exercise of its discretionary jurisdiction point strongly to the appropriateness of granting certiorari here. The recurring nature of the questions presented makes this especially the kind of case where compelling considerations exist for this Court's review to precede—rather than to follow upon—the emergence of a direct conflict between the courts of appeals in different circuits. Compare *Commarano* v. *United States*, 358 U.S. 498, 500. Indeed, this Court's definitive adjudication now of the questions presented by this Petition for Certiorari could result in saving literally hundreds of hours of time which otherwise the lower federal courts throughout the country will probably find it necessary to devote to numerous cases presenting the same questions.

II

The decisions below have interpreted and applied the Internal Revenue Code in a manifestly unfair and unjust manner, contrary to the public interest and probably in conflict with principles enunciated in prior decisions of this Court.

This Court in several decisions has had occasion to sustain the deductibility of ordinary and necessary business expenses in accordance with a practical and common sense application of the statutory language. *Commissioner* v. *Heininger*, 320 U.S. 467; *Lilly* v. *Commissioner*, 343 U.S. 90; *Commissioner* v. *Sullivan*, 356 U.S. 27.[7] Moreover, an expense may be deductible though it happen but once in the taxpayer's lifetime, provided the matter which gives rise to it is (as here) of common or frequent occurrence in the type of business involved. *Deputy* v. *DuPont*, 308 U.S. 488, 495; *Kornhauser* v. *United States*, 276 U.S. 45.

The decisions below appear out of harmony with principles expressed by this Court in the cases cited. Here "the accepted meaning of the words" of the statute—which is what the courts below should have followed, *Commissioner* v. *Sullivan*, supra, 356 U.S. at 29—was flagrantly departed from. This was done in purported compliance with a recently (1958) promulgated "expenses for education" regulation (see pages 6-7, supra).

This regulation by its terms is plainly compatible with sustaining the deductibility of the expenses involved in this case. But in any event, any effort to apply the regulation here should have recognized that an interpretation which would read the regulation as barring the deductions claimed in this case would bring the regulation into direct collision with the statute. Indeed, the manner in which the regulation has here been applied involves fundamental tax discrimination against many classes of professional people who, after

[7] Compare the Second Circuit's decision in *Coughlin* v. *Commissioner*, 203 F. 2d 307, holding a lawyer's expenses of attending and participating in a tax institute to be deductible.

they have actively entered upon the practice of their profession, nevertheless go on to incur substantial expenses for the purpose of broadening their experience and improving their skills in ways which, sooner or later, are likely to lead to increased professional recognition and advancement. The "expenses for education" regulation has not as yet been before this Court for review, and its widespread impact upon all categories of professional people underscores the need for obtaining a more definitive adjudication of its validity and scope.

The decisions below are especially detrimental to the public interest since they put serious, unreasonable and unwarranted tax obstacles in the way of obtaining more highly skilled practitioners in the important area of mental health. When Congress enacted the Mental Health Study Act of 1955 (Public Law 182, 84th Cong., 1st Sess.; 69 Stat. 381), it recognized, among other things, that "47 per centum of the hospital beds in the Nation are occupied by mental patients", and that "there is strong reason to believe that one of the greatest impediments to more rapid progress in the field of mental health is a definite shortage of professional personnel in all categories"; and Congress further provided in Section 2(b) of the Act that:

> "It is declared to be the policy of the Congress to promote mental health and to help solve the complex and the interrelated problems posed by mental illness by encouraging the undertaking of nongovernmental, multidisciplinary research into and reevaluation of all aspects of our resources, methods, and practices for diagnosing, treating, caring for, and rehabilitating the mentally ill, including research aimed at the prevention of mental illness. . . ."

Studies subsequently undertaken continue to refer to mental illness as being "commonly classed as [America's] No. 1 health problem."[8]

This Court has recognized that in the interpretative process which helps to mark out the boundary between deductible and non-deductible expenses, proper weight should be given to "general policy" reflected elsewhere in federal law. *Textile Mills Securities Corp.* v. *Commissioner*, 314 U.S. 326, 337-339; *Cammarano* v. *United States*, *supra*, 358 U.S. at 508-509; compare *Tank Truck Rentals* v. *Commissioner*, 356 U.S. 30; *Hoover Motor Express* v. *United States*, 356 U.S. 38. In the particular cases cited the general policy was hostile to deductibility and the expense was disallowed. But here it is clear that federal public policy, which Congress has been at pains to declare and express, is not hostile but highly favorable to encouraging greater professional skill and competence in the field of mental health. Certainly the federal public policy should be at least equally serviceable as a guide to interpretation where, as here, it works in favor of the taxpayer by being wholly hospitable to the deduction.

III

The decisions below conflict at least in principle with the Second Circuit's decision in *Marlor* v. *Commissioner*, 251 F. 2d 615, and also with the Third Circuit's recent decision in *Devereaux* v. *Commissioner*, decided June 19, 1961, 61-2 USTC ¶9520.

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[8] "Action for Mental Health", being the Final Report of the Joint Commission on Mental Illness and Health (1961), p. 10, this being a study undertaken pursuant to the Mental Health Study Act of 1955 under grants administered by the National Institute of Mental Health.

Marlor unanimously reversed the Tax Court, 27 T.C. 624, on the basis of the dissenting opinion in the Tax Court. Marlor had received a temporary appointment as tutor at Queens College. To be eligible for a permanent position, and also meanwhile to be assured of reappointment as tutor, it was necessary for him to show that he was making progress toward a doctoral degree; accordingly he began graduate studies and sought to deduct the cost as a business expense. The Tax Court dissenting opinion, with which the Second Circuit "agree in all respects", took the position that Marlor's expense was clearly deductible, particularly in view of his dual objective—not merely to qualify for appointment to the permanent staff, but also to retain his position as tutor; " in short, the expenses incurred by petitioner were necessary in order to earn the very income which the Commission seeks to tax". 27 T.C. at 626.

In the present case a comparable duality appears. The record (R. 83-84, 96, 113, 133) as well as the opinions of the Tax Court (R. 177) and the Court of Appeals (see page 7a, infra) all make it clear that one (though by no means the only one) of the objectives and ordinary consequences of participating in the program of the institute is that the psychiatrist is enabled to maintain and enlarge his practice by receiving considerable referral patients from other psychiatrists and that in the regular course of business this is to be expected. Under the principles approved by the Second Circuit in *Marlor*, the deductions here should have been sustained for this reason alone.[9]

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[9] And compare *Lilly* v. *United States*, *supra*, where this Court held that deductions could properly be taken for expenses incurred in obtaining business by referral.

In *Devereaux* the Tax Court was likewise unanimously reversed for having denied deductions for expenses incurred in connection with studies leading to a Ph.D. degree. Devereaux had committed himself to study for a Ph.D. and had then been given permanent tenure, but the actual expenses which the Third Circuit held deductible were made after permanent tenure had been obtained. The Court of Appeals, noting that "the courts are inclined toward liberality" in applying the new educational expense regulations, held that the deduction was not barred by the fact that the Ph.D. might make Devereaux eligible for promotion or increase in salary. It seems evident that the principles reflected in the Third Circuit's *Devereaux* decision would, if carried over into the field of practicing psychiatrists, lead to reversal of the Tax Court in the present case as well.

IV

In the Court of Appeals petitioners were turned back on the ground that although their evidence and arguments "are not without persuasive force", nevertheless "they are not so weighty as to compel us to conclude that the findings of fact of the Tax Court are so clearly untenable and erroneous that under the rule the judgment of the Tax Court must be reversed" (page 9a, infra). The Court of Appeals relied on this Court's recent decision in *Commissioner* v. *Duberstein*, 363 U.S. 278, 290-291. But under the circumstances of this case the confusion and contradictions reflected in the Tax Court's majority opinion made it particularly essential for the case to receive careful appellate scrutiny in the light of correct legal standards. Instead, the Court of Appeals misapplied *Duberstein* and conferred on the Tax Court's determination a degree of finality and deference wholly inappropriate to the occasion.

This Court's decisions in *Commissioner* v. *Sullivan*, supra, and *Lilly* v. *Commissioner*, supra, both sustained business expense deductions despite adverse determinations by the Tax Court. *Duberstein* has not abolished the appellate review on such matters which 26 U.S.C. § 7482 contemplates. Nor has *Duberstein* committed to the Tax Court the final determination of applicable standards of law on issues such as this case presents.

CONCLUSION

The decision below inflicts unwarranted tax hardship; it affects large numbers of taxpayers; it creates an undesirable tax obstacle to improving professional skills in the vital field of mental health; and it is difficult to reconcile with principles which have been reflected in prior decisions of this Court and in recent decisions of other circuits. A definitive adjudication on the merits by this Court in this case should avoid substantial litigation in other comparable cases which otherwise must be expected to be instituted and to occupy much time of the lower federal courts throughout the country. For each and all of the reasons set forth in this Petition, certiorari should be granted.

Respectfully submitted,

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August 25, 1961

OPINION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8126

ARNOLD NAMROW and LILLIAN NAMROW, and JAY C. MAXWELL and DOROTHY N. MAXWELL, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition to Review the Decisions of the Tax Court of the United States

(Argued January 19, 1961 Decided March 27, 1961)

Before SOPER, HAYNSWORTH and BOREMAN, Circuit Judges.

Elizabeth S. Freret (Wenchel, Schulman & Manning on brief) for Petitioners, and Fred E. Youngman, Attorney, Department of Justice, (Abbott M. Sellers, Acting Assistant Attorney General, and Lee A. Jackson and Meyer Rothwacks, Attorneys, Department of Justice, on brief) for Respondent.

SOPER, Circuit Judge:

Upon this petition for review we must decide whether there is sufficient evidence to sustain the ruling of the Tax Court that expenditures made by two psychiatrists in order to qualify themselves to practice psychoanalyses are not deductible in computing their taxable income. The Commissioner of Internal Revenue determined a deficiency against Dr. Arnold Namrow and his wife for the year 1954 in the sum of $376.84, and against Dr. Jay C. Maxwell and his wife for 1954 and 1955 in the respective sums of $290.90 and $639.44. The cases were consolidated for trial and the determinations of the Commissioner were

sustained. In each case the taxpayer was engaged in the practice of psychiatry in Washington, D. C. during the tax years and paid certain fees as a student in the Washington Psychoanalytic Institute for training in psychoanalysis. The deductibility of these expenditures gives rise to the instant controversy.

Psychiatry is a medical specialty which deals with the study and treatment of mental disorders and is recognized as a specialty by the American Medical Association, the American Psychiatric Association, and the American Neurological Association. The minimum qualification of a doctor as a psychiatrist consists of graduation from a recognized medical school, one year of general internship, and one year of specialized residency in an institution for the treatment of mental disorders which has been approved by the American Medical Association and the American Psychiatric Association. In actual practice full recognition as a psychiatrist is obtained only by additional years as a resident psychiatrist in a mental institution and passing an examination set by the American Board of Psychiatry and Neurology.

Still further training is required if a psychiatrist desires to obtain general recognition as one qualified to practice in the special field of psychoanalysis. This method for the treatment of mental disorders derives its importance from the studies of Sigmund Freud, who conceived the idea of the unconscious mind and developed a method of analyzing a person's mental life which is now widely accepted by psychiatrists as a form of psychotherapeutic treatment. Psychotherapy is a general term which includes, according to qualified witnesses in this case, sitting down with the patient and encouraging him to talk freely to the doctor about himself so as to discover his history and his emotional and personal difficulties. It is sometimes described as the "talking cure", which is generally employed

by psychiatrists and more or less consciously by ministers of religion and laymen whose work involves consultation with persons in difficult situations. The most intensive form of this treatment is psychoanalysis, which is described by the taxpayers in this case as "the revolutionary technique originated by Freud in which emotionally maladjusted but otherwise intelligent adults explore deeply into the workings of their conscious and unconscious minds by talking freely with the psychiatrist until they ultimately are able to recognize and re-examine rationally those intense feelings and experiences which theretofore were buried in and distorted by the unconscious mind".

It is generally recognized by psychiatrists that the technique originated by Freud demands an exceptional degree of emotional objectivity and control on the part of the doctor. On this account specialized institutes for the training and supervision of prospective analysts have been set up in fourteen cities in the United States and organized in accordance with regulations and standards of the American Psychoanalytic Association. The Washington Psychoanalytic Institute attended by the taxpayers was one of these institutes and a description of its operations demonstrates the special training which, in the opinion of the medical profession in general and of its psychiatric branch in particular, is needed to qualify a psychiatrist to practice psychoanalysis.

In its annual bulletin the Washington Psychoanalytic Institute is denominated a school for the training of psychiatrists in the theory and practice of psychoanalysis. It has a faculty of nineteen doctors listed as "supervising and training analysts" and seven doctors listed as "teaching analysts". Formal registration of students takes place in September, and lectures and seminar instruction are given in two semesters beginning on September 28 and January 15, respectively. Applicants must have served creditably a general internship of one year in a Class A hospital ap-

proved by the American Medicial Association, and have had one year full-time work in a psychiatric hospital approved by the American Medical Association and the American Psychiatric Association. It is also understood that the applicant shall have completed three years of approved psychiatric training prior to the completion of his training in psychoanalysis.

Furthermore, the applicant must pledge himself in writing neither to conduct psychoanalytic treatment nor to represent himself as a psychoanalyst until he has been authorized to do so by the faculty of the Institute.

The bulletin of the Washington Psychoanalytic Institute describes the three general divisions of the training program. This includes, first, a preparatory analysis of the applicant himself, the duration of which may require several years. Its objective is freedom from personality factors that would interfere with the ability to conduct psychoanalytic treatment. The second division of the training, called "Theoretical Instruction", consists of a graduated series of lectures and seminars covering the theory and technique of psychoanalysis. The third division of the training program requires the student to conduct a minimum of four analyses of patients under supervision. The patients are seen at least four times a week and the student is to have at least two supervising analysts. A minimum total of two hundred hours of supervision of analysis is required. Finally, the student, availing himself of the advice of his supervising analyst, will prepare a clinical paper regarding the course of his work with a patient and submit a copy of the paper to an examining panel of three members of the Education Committee. The bulletin sets forth the curriculum for each year for three years but in actual experience the training program usually requires a much longer period. Upon its completion the student is entitled to membership in the Washington Psychoanalytic Society, whose members are entitled to membership in the American Psychoanalytic Association.

Since the students of the Washington Psychoanalytic Institute must be qualified psychiatrists they customarily engage in the private practice of psychiatry while taking the training at the Institute and both taxpayers in this case were so engaged during the tax periods. Dr. Arnold Namrow was awarded the M.D. degree by Washington University, St. Louis, Missouri, in 1947, and served an internship in St. Elizabeth's Hospital, Washington, D. C. Thereafter he was a resident in psychiatry in two veterans' hospitals in Washington from August 1948 to February 1951. He was a medical officer in the Navy from February 1951 to February 1953, and for a portion of 1953 was a psychiatrist in a veterans' hospital and later in a child guidance clinic. In September 1953, he entered private psychiatric practice in Washington, meanwhile having applied, in June 1953, for entrance into the Washington Psychoanalytic Institute. In 1954, he commenced the preparatory part of the training program, consisting of personal analysis, under Dr. Mabel Cohen, a member of the faculty of the Institute, and continued therein until March 1957. During 1954 he paid Dr. Cohen $2250.00 for his personal analysis, and also paid Dr. Douglas Nobel, also a member of the faculty, the sum of $375.00 for services as supervising analyst. He expected to finish his training at the Institute in 1960 and thereupon become eligible for membership in the psychoanalytic associations.

Dr. Jay C. Maxwell was awarded the degree of M.D. by the Medical School of Duke University in 1948 and served a year of general internship and a year of psychiatric residency, so that he became a qualified psychiatrist in October 1950. Subsequently he became a trainee at the Chicago Psychoanalytic Institute from which he transferred to the Washington Institute in 1953. He completed his training in personal analysis in Chicago in 1953 and made payment of $280.00 therefor in 1954 to the psychoanalyst who had charge thereof. During 1954 and 1955 he paid various sums, which aggregated $705.00 in the

former and $1185.00 in the latter year, to divers members of the faculty of the Washington Psychoanalytic Institute for services as supervising analysts. He also paid $270.00 in 1954 and $610.00 in 1955 for lectures and seminars in his course at the Institute with the expectation of finishing his training in 1960. During the tax years he engaged in the practice of psychiatry in Washington.

Each taxpayer claims that his expenditures for personal analysis and for the services of supervising analysts were deductible as ordinary and necessary expenditures under § 162 of the Internal Revenue Code of 1954 but the Commissioner disallowed these claims. Dr. Maxwell also claims deductions for the depreciation of his automobile and automobile expenses in 1954 and 1955. The automobile expenses were disallowed to the extent that they were incurred in attendance upon the course of instruction at the Washington Psychoanalytic Institute.

The Tax Court, five judges dissenting, upheld the Commissioner's determinations. Its decision is based largely on the interpretative application of § 162 of the Code, which is contained in § 1.162-5 of the Treasury Regulations entitled "Expenses for Education". The gist of this section of the regulations is that expenditures for education are deductible if the education is undertaken primarily for the purpose of maintaining or improving skills required by the taxpayer in his trade or business, but are not deductible if they are for education undertaken for the purpose of obtaining a new position or substantial advancement in position or in order to meet the minimum requirements for qualification in his intended trade or business or specialty therein.

The validity of the regulation is not disputed.* The question is whether, under the undisputed facts, the cases fall into one category or the other. We think there is sufficient evidence to support the Tax Court's position. The preponderance of the evidence plainly shows that neither an ordinary physician nor one who has had sufficient additional training to practice psychiatry is considered qualified to practice psychoanalysis unless he has submitted to long and intense additional education and training in the psychoanalytic field. These requirements are not based on statute but on the body of medical opinion that finds expression in representative and recognized medical societies and particularly in the formation of the psychoanalytic institutes in great centers of population which set the standards that are accepted in practice.

Most persuasive of the existence of these requirements is the conduct of the taxpayers themselves in making substantial expenditures of money and devoting long periods of time in intensive training while practicing psychiatry in order to secure the recognition of their professional brethren as competent to engage in the practice of psychoanalysis. It is admitted that their general purpose was to secure referrals from other physicians, which are necessary in the successful practice of psychoanalysis. To this end each of these pledged himself not to administer psychoanalytic treatment or represent himself as a psychoanalyst until he had been authorized to do so by the faculty of the Institute, and each acknowledged that seven years will have passed before his training at the Institute is complete. It was explained by psychiatrists testifying on their behalf that the purpose of the pledge was to make sure that the student is competent before he goes into practice and that

* The rules laid down in the regulations are in accord with the decisions of the courts. See *Hall* v. *Commissioner*, 4 Cir., 181 F. 2d 906; *Coughlin* v. *Commissioner*, 2 Cir., 203 F. 2d 307; *Kamons* v. *Commissioner*, 25 T.C. 1238; *Carden* v. *Commissioner*, 17 T.C. 3; *Warlow* v. *Commissioner*, 2 Cir., 251 F. 2d 615.

a reliable psychiatrist did not hold himself to be an analyst without completing the Institute's course. Thus there is solid ground for the conclusion of the Tax Court that the expenditures were made in order to acquire a special skill not possessed by ordinary psychiatrists. In this respect the Tax Court said:

> "We think it fairly appears from this record that a psychiatrist cannot establish himself as a psychoanalyst without completing an Institute. This becomes more evident from other testimony to the effect that psychiatrists obtain most all of their patients by referrals from other doctors, principally other psychiatrists, because they prefer not to treat people with whom they are acquainted. In view of this, it is extremely unlikely that a psychiatrist could ever establish a psychoanalytic practice without attendance at an Institute. Nemrow testified he received the majority of his referrals, and Maxwell, a substantial number of his referrals, from colleagues at the Institute".

In opposition the taxpayers point to evidence given on their behalf by qualified psychiatrists and psychoanalysts to the general effect that the dividing line between psychiatry and psychoanalysis is very thin. They say that psychoanalysis is merely an intensive form of psychotherapeutic treatment customarily administered by psychiatrists and that psychiatry is recognized as a specialty by the American Medical Association but psychoanalysis is not. They add that sometimes practicing psychiatrists or even ordinary physicians subject themselves to personal psychoanalysis, since it enables them to practice their profession more effectively;* that candidates for training in the Washington Psychoanalytic Institute sometimes come to the Institute after they have already engaged in psychoanalytic practice and that trainees in the Institute are

* See John S. Watson, 31 T.C. 1014.

allowed to call themselves psychoanalysts (under supervision) after they have undergone personal analyses for a period of one year. Moreover, it is said that a general practitioner of medicine without analytic training may legally practice psychoanalysis, although he would not be considered qualified by psychiatrists and would not get referrals from them. For all of these reasons it is said that the Institute does not teach a new skill but merely improves the skill which every psychiatrist possesses.

It is contended in addition, in this aspect of the case, that the fees paid by the taxpayers were deductible as business expenses under § 162(a)(1) because the personal psychoanalysis to which candidates in an institute are subjected and the supervision of their analyses of patients during their course of training constitute professional consultations similar to those which occur when one physician calls in another for diagnosis and treatment of a patient. It is said, moreover, that the fees paid are business expenses in a very practical sense as the cost of obtaining new business (as in *Lilly* v. *Commissioner*, 343 U.S. 90), since the training produces referrals that the candidates would not otherwise obtain.

This evidence and these arguments are not without persuasive force, but they are not so weighty as to compel us to conclude that the findings of fact of the Tax Court are so clearly untenable and erroneous that under the rule the judgment of the Tax Court must be reversed. See *Commissioner* v. *Duberstein*, 363 U.S. 278, 290-291; *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395; *City Ice Delivery Co.* v. *United States*, 4 Cir., 176 F.2d 247. To some extent at least the evidence produced by the taxpayers supports the Tax Court's determination. It cannot be disputed that all of the activities for which the fees were paid, including the psychoanalyses of patients under supervision after completion of the first year of training, were parts of a course of training which, in the opinion of

psychiatrists generally, is needed to qualify a psychiatrist to engage in a certain type of psychiatric practice. These activities do not lose their quality as training techniques because they were similar to those used by qualified practitioners. The true purpose and effect of an expense govern its deductibility. See *Weiss* v. *Stearn*, 265 U.S. 242; *Rollman* v. *Commissioner*, 4 Cir., 144 F.2d 634. The experts produced by the taxpayers clearly held the opinion that a psychiatrist should not hold himself as a psychoanalyst unless he had completed long years of training at a psychoanalytic institute. The basic question of fact, whether psychoanalysis requires the acquisition of a new skill or the improvement of one already possessed, still remains to be answered; and the existence throughout the country of psychoanalytic institutes and societies and the organization of the American Psychoanalytic Association on a national scale support the view that even if psychoanalysis is not formally recognized as a specialty by the American Medical Association, it is in effect so regarded by a large body of medical opinion without whose approval it cannot be successfully practiced.

The taxpayers make the alternative contention that the expenditures were deductible under § 213 of the 1954 Code, which allows the deduction of expenses for medical care of a taxpayer under 65 years of age to the extent that the expenses exceed 3 per cent of the adjusted gross income. Under this section the Commissioner has ruled that such medical expenses include payments for services of qualified psychiatrists. Rev. Rul. 55-261, 1955, 1 C.B. 307. This contention was rejected by the Tax Court unanimously and, we think, correctly. The members of the faculty of the Institute who rendered services to the taxpayers were not called in to treat them for illness but to train them to practice a profession.

Affirmed.

JUDGMENT

Filed and Entered March 27, 1961

On Petition to Review the decisions of the Tax Court of the United States.

This Cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the decisions of the said Tax Court of the United States, in this cause, be, and the same are hereby affirmed.

March 27, 1961.

Morris A. Soper
United States Circuit Judge

ORDER DENYING MOTION FOR REHEARING

Filed and Entered May 31, 1961

The motion for rehearing in this case has been read and considered, and the Court being of the opinion that it is without merit it is hereby denied.

Morris A. Soper
United States Circuit Judge.

Clement F. Haynsworth, Jr.
United States Circuit Judge.

Herbert S. Boreman
United States Circuit Judge.

STATUTES AND REGULATIONS INVOLVED

Section 162(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 162(a), includes the following:

> (a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> (1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

Section 213(e) of the Internal Revenue Code of 1954, 26 U.S.C. § 213(e), defining the "medical care" for which medical expense deductions are allowable, provides:

> (e) Definitions.—For the purposes of this section
>
> (1) The term "medical care" means amounts paid—
>
> (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or
>
> (B) for transportation primarily for and essential to medical care referred to in subparagraph (A).

Section 7482 of the Internal Revenue Code of 1954, 26 U.S.C. § 7482, relating to judicial review of the Tax Court, provides in part:

> (a) Jurisdiction.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decision of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury: . . .
>
> (c) Powers.—
>
> (1) To affirm, modify, or reverse.—Upon such review, such courts shall have power to affirm or, if

the decision of the Tax Court is not in accordance with law, to modify or reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

Section 1.162-5 of Treasury Regulations provides in part as follows:

1.162-5. EXPENSES FOR EDUCATION. (a) Expenditures made by a taxpayer for his education are deductible if they are for education (including research activities) undertaken primarily for the purpose of

(1) Maintaining or improving skills required by the taxpayer in his employment or other trade or business, or

(2) Meeting the express requirements of a taxpayer's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the taxpayer of his salary, status, or employment. Whether or not education is of the type referred to in subparagraph (1) of this paragraph shall be determined upon the basis of all the facts of each case. If it is customary for other established members of the taxpayer's trade or business to undertake such education, the taxpayer will ordinarily be considered to have undertaken this education for the purpose described in subparagraph (1) of this paragraph. Expenditures for education of the type described in subparagraph (2) of this paragraph are deductible under subparagraph (2) only to the extent that they are for the minimum education required by the taxpayer's employer, or by applicable law or regulations, as a condition to the retention of the taxpayer's salary, status, or employment. Expenditures for education other than those so required may be deductible under subparagraph (1) of this paragraph if the education meets the qualifications of subparagraph (1) [illegible]

(b) Expenditures made by a taxpayer for his education are not deductible if they are for education undertaken primarily for the purpose of obtaining a new position or substantial advancement in position, or primarily for the purpose of fulfilling the general

educational aspirations or other personal purposes of the taxpayer. The fact that the education undertaken meets express requirements for the new position or substantial advancement in position will be an important factor indicating that the education is undertaken primarily for the purpose of obtaining such position or advancement, unless such education is required as a condition to the retention by the taxpayer of his present employment. In any event, if education is required of the taxpayer in order to meet the minimum requirements for qualification or establishment in his intended trade or business or specialty therein, the expense of such education is personal in nature and therefore is not deductible.

* * *

(c) The provisions of this section may be illustrated by the following examples:

* * *

Example (2). B, a general practitioner of medicine, takes a course of study in order to become a specialist in pediatrics. C, a general practitioner of medicine, takes a 2-week course reviewing developments in several specialized fields, including pediatrics, for the purpose of carrying on his general practice. B's expenses are not deductible because the course of study qualified him for a specialty within his trade or business. C's expenses for his education and any transportation, meals, and lodging while away from home are deductible because they were undertaken primarily to improve skills required by him in his trade or business.